SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2002-000514 12/08/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

STATE OF ARIZONA

DOUGLAS W JANN

v.

JIMMY DANIEL HAMMACK JR.

JAY L CIULLA

JUDGE PORTER
PHX JUSTICE CT-WEST
REMAND DESK-LCA-CCC
DENNIS METRICK
LIMITED JURISDICTION COURT
111 W MONROE, #820
PHOENIX AZ 85003
BRIAN KARTH
LIMITED JURISDICTION COURT
111 W MONROE, #820
PHOENIX AZ 85003
JUDGE RACHEL CARRILLO
WEST PHOENIX JUSTICE COURT
1 W MADISON ST
PHOENIX AZ 85003-2132

RECORD APPEAL RULE / REMAND

WEST PHOENIX JUSTICE COURT

Cit. No. #CR01-02298MI

Charge: CNT 1: ISSUING BAD CHECK, A CLASS 1 MISDEMEANOR
CNT 2: ISSUING BAD CHECK, A CLASS 1 MISDEMEANOR
CNT 3: ISSUING BAD CHECK, A CLASS 1 MISDEMEANOR
CNT 4: ISSUING BAD CHECK, A CLASS 1 MISDEMEANOR
CNT 5: ISSUING BAD CHECK, A CLASS 1 MISDEMEANOR

LC 2002-000514 12/08/2004

DOB: 01/11/64

DOC: 05/05/00; 05/07/00; 05/02/00; 05/15/00; 05/08/00

Previously, this Court heard oral argument in this criminal appeal on October 25, 2004, and from the bench entered an order reversing and vacating the most recent sentence in this case. This Court indicated to counsel that a written opinion would follow. This is that opinion.

This Court has jurisdiction of this criminal appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This case involves recurring issues of concern to many limited jurisdiction courts throughout Maricopa County. The issues presented in this case are similar to the issues in at least four other pending matters before this court. However, this case involves only one appeal from the West Phoenix Justice Court, and for purposes of this opinion, this Court has considered the record from the West Phoenix Justice Court and the excellent memorandum and oral argument presented by counsel to the Court.

Appellant, Jimmy Daniel Hammack, Jr., was charged and convicted on June 12, 2002 in the West Phoenix Justice Court of five counts of Issuing a Bad Check, all class 1 misdemeanors in violation of A.R.S. Section 13-1807. At the time of the sentencing on June 20, 2002, the trial judge (the Honorable Rachel Carrillo, West Phoenix Justice of the Peace) pronounced sentence in open court immediately following the determination of guilt, pursuant to Rule 26.3(a)(2), Arizona Rules of Criminal Procedure. The record reveals that no sentence of jail or fine was imposed, nor did the court place Appellant on probation. Rather, the Court's sentence consisted of restitution, which was later determined to be $9, 284.64. Appellant timely filed a Notice of Appeal, and the appeal was heard and determined by this Court on August 29, 2003.[1] This Court affirmed the convictions and sentence and remanded the matter back to the West Phoenix Justice Court "for all further and future proceedings in this case."[2]

It was this Court's specific intent that the matter be remanded for imposition of the sentence previously imposed. Unfortunately, when the matter was returned to the West Phoenix Justice Court, Judge Carrillo was not available that day and the matter was heard by a judge pro tem. The judge pro tem proceeded to re-sentence Appellant. At this resentencing, the judge pro tem ordered that Appellant be placed on three years of unsupervised probation and reaffirmed the prior restitution order. Appellant promptly filed another Notice of Appeal from this "resentencing". Appellant contends on appeal that the judge pro tem erred in resentencing him as he had already been sentenced. Appellee concurs with the position of the Appellant.

[1] I rejected Appellant's contention that he was entitled to a trial by jury for the charges of issuing a bad check.
[2] Minute entry opinion of August 29,2003, at page 4.

This Court first notes, that in its order affirming and remanding the case back to the West Phoenix Justice Court, this court clearly "affirmed the judgment of convictions and sentence imposed."[3] This Court did not remand for a new trial or for resentencing. It appears to be a common practice in many limited jurisdiction courts that when a matter is remanded, even though the sentence and conviction have been affirmed, to reset the matter for a "sentencing." This is incorrect. If the trial judge at "resentencing" orders the same sentence that was previously affirmed by this court, then it implies that the criminal defendant who has been "resentenced" is entitled to another right to appeal. This Court has dismissed several "re-appeals" from "resentencings". Clarification and use of proper terminology should avoid such a result. When a sentence and conviction are affirmed by the Superior Court, the limited jurisdiction courts should schedule the cases for "execution" or "imposition" of sentence, upon remand. This proceeding would require a criminal defendant to appear to make arrangements to pay the fine or to begin serving a jail sentence that was previously ordered by the court at the original sentencing proceeding.

Where the Superior Court affirms a conviction and sentence, and the trial court sets the matter for a "resentencing" it is also entirely conceivable that a greater sentence or different sentence than that originally ordered could be imposed. This is exactly what happened in this case. Whether in error, or ignorance, the judge pro tem ordered a sentence greater than the one ordered by the original trial judge, Judge Rachel Carrillo, without findings of fact warranting such a sentence. This was clear error.

Rule 26.14, Arizona Rules of Criminal Procedure, provides:

> Where a judgment or sentence, or both, have been set aside on appeal, by collateral attack or on a post-trial motion, the court may not impose a sentence for the same offense or a different offense based on the same conduct, which is more severe than the prior sentence, unless (1) it concludes, on the basis of evidence concerning conduct by the defendant occurring after the original sentencing proceeding, that the prior sentence is inappropriate, or (2) the original sentence was unlawful and on remand it is corrected and a lawful sentence imposed, or (3) other circumstances exist under which there is no reasonable likelihood that the increase in the sentence is the product of actual vindictiveness by the sentencing judge (emphasis added).

The record does not reveal that any of the provisions of the foregoing rule apply to warrant a greater sentence following appeal by the Appellant in this case. Of course, the foregoing rule

[3]Id.

applies when a judgment or sentence has been set aside on appeal, and it clearly appears from the record in this case that the first sentence had not been vacated or set aside on appeal.

Therefore, this Court concludes that this case must be remanded back to the West Phoenix Justice Court for execution of sentence. Sentencing occurred on June 20, 2002. That sentence will be affirmed. The "resentencing" will be vacated in its entirety.

IT IS THEREORE ORDERED reversing and vacating the Order of the West Phoenix Court of February 12, 2004 "resentencing" Appellant and ordering a sentence of three years probation.

IT IS FURTHER ORDERED affirming the sentence previously entered in this case on June 20, 2002 (and the restitution order of July 25, 2002) as the sentence which is effective in this case.

IT IS FURTHER ORDERED remanding this matter back to the West Phoenix Justice Court only for purposes of execution of sentence, and the return of the record and file.

/ s / HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT